

Leary v Mt. Sinai Morningside Hosp.

2025 NY Slip Op 32057(U)

May 29, 2025

Supreme Court, New York County

Docket Number: Index No. 805368/2023

Judge: John J. Kelley

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

-----X

SHARON LEARY

Plaintiff,

- v -

MT. SINAI MORNINGSIDE HOSPITAL,

Defendant.

-----X

INDEX NO. 805368/2023

MOTION DATE 02/14/2025

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to/for DISMISS.

In this action to recover damages for medical malpractice, the defendant moves pursuant to CPLR 1021 to dismiss the complaint for the failure timely to substitute a representative of the plaintiff's estate in place and instead of the deceased plaintiff. The plaintiff's former attorney opposes the motion. The motion is denied.

The plaintiff died on March 29, 2024, and her attorney notified the court of her death on April 1, 2024. As the court explained in a companion order dated May 29, 2025, the death of a party divests a court of jurisdiction to conduct proceedings in an action until a proper substitution had been made pursuant to CPLR 1015(a) (see *Griffin v Manning*, 36 AD3d 530, 532 [1st Dept 2007]; see also *Perez v City of New York*, 95 AD3d 675, 677 [1st Dept 2012]; *Manto v Cerbone*, 71 AD3d 1099 [2d Dept 2010]; *Nieves v 331 E. 109th St. Corp.*, 112 AD2d 59, 60 [1st Dept 1985]). It further noted that any determination rendered or proceedings held without such a substitution generally will be deemed a nullity (see *Griffin v Manning*, 36 AD3d at 532; *Stancu v Cheon Hyang Oh*, 74 AD3d 1322, 1322-1323 [2d Dept 2010]; *Morrison v Budget Rent A Car Syst., Inc.*, 230 AD2d 253 [2d Dept 1997]; *Nieves v 331 E. 109th St. Corp.*, 112 AD2d at 60). Rather, the court further explained that the action was automatically stayed upon the party's

death (see *Perez v City of New York*, 95 AD3d at 677), and that the parties may not “by agreement confer subject matter jurisdiction upon the court where there is none” (*Cuomo v Long Island Lighting Co.*, 71 NY2d 349, 351 [1988]; see *Haverstraw Park, Inc. v Runcible Properties Corp.*, 33 NY2d 637 [1973]; *Stancu v Cheon Hyang Oh*, 74 AD3d at 1323) by stipulating to conducting further proceedings prior to the substitution of a personal representative for the deceased party. The court noted that any such stipulation would be “legally inoperative” (*Morrison v Budget Rent A Car Syst., Inc.*, 230 AD2d at 261). “Although a determination rendered without such substitution will generally be deemed a nullity, determinations . . . pursuant to CPLR 1021 are a necessary exception to the general rule, and the court does not lack jurisdiction to consider such a motion” (*Medlock v Dr. William O. Benenson Rehabilitation Pavilion*, 167 AD3d 994, 995 [2d Dept 2018]; see *Lee v Leeds, Morelli & Brown, P.C.*, 233 AD3d 1072, 1076 [2d Dept 2024]; *Barnabas v Boodoo*, 134 AD3d 970, 972 [2d Dept 2015]; *Vapnersh v Tabak*, 131 AD3d 472, 474 [2d Dept 2015]).

Pursuant to a notice of motion that was dated, served, and filed on December 17, 2024, the defendant made the instant motion (see CPLR 2211) pursuant to CPLR 1021 to dismiss the complaint for failure timely to substitute a representative of the decedent’s estate as a party plaintiff. This court, however, lacks jurisdiction to grant the defendant’s motion to dismiss the complaint pursuant to CPLR 1021, since, “before proceeding further,” and “[upon] such notice as it may in its discretion direct,” the court was required to “order the persons interested in the decedent’s estate to show cause why the action . . . should not be dismissed” (*Velez v New York Presbyt. Hosp.*, 145 AD3d 632, 633 [1st Dept 2016], quoting CPLR 1021; see *Noriega v Presbyterian Hosp. in City of N.Y.*, 305 AD2d 220, 221 [1st Dept 2003]; *Petty v Meadowbrook Distrib. Corp.*, 266 AD2d 88, 88 [1st Dept 1999]). Since the defendant did not move by order to show cause, and the court did not order persons interested in the decedent’s estate, such as her next of kin, to show cause why the complaint should not be dismissed for the failure to effectuate a timely substitution, the court must deny the motion on that ground alone (see *Velez*

v New York Presbyt. Hosp., 145 AD3d at 633; *Noriega v Presbyterian Hosp. in City of N.Y.*, 305 AD2d at 221; *Petty v Meadowbrook Distrib. Corp.*, 266 AD2d at 88).

In any event, the defendant did not wait a reasonable time before making the instant motion.

“A motion for substitution may be made by the successors or representatives of a party or by any party. If a person who should be substituted does not appear voluntarily he may be made a party defendant. If the event requiring substitution occurs before final judgment and substitution is not made within a reasonable time, the action may be dismissed as to the party for whom substitution should have been made, however, such dismissal shall not be on the merits unless the court shall so indicate”

The issue of what constitutes a reasonable time depends on the circumstances of the case (see *Randall v Two Bridges Assoc. Ltd. Partnership*, 139 AD3d 435, 436 [1st Dept 2016]), including the diligence of the party who will ultimately seek substitution, the prejudice to the other parties, and whether the party who eventually will be substituted has shown that the action has potential merit (see *Green v Maimonides Med. Ctr.*, 172 AD3d 824, 826 [2d Dept 2019]).

The defendant waited less than nine months after the plaintiff's death to make the instant motion. The defendant has not established, under the circumstances of this case, that it waited a “reasonable” time before moving to dismiss the complaint, and has not demonstrated that there has been a “protracted” delay on the part of the decedent's next of kin in seeking substitution, let alone that it would be prejudiced by any future substitution (see *Dugger v Conrad*, 189 AD3d 478, 479-480 [1st Dept 2020]; *Petion v New York City Health & Hosps. Corp.*, 175 AD3d 519, 520 [2d Dept 2019] [lapse of almost five years between plaintiff's death and appointment of representative of plaintiff's estate, and additional lapse of one more year before representative moved to be substituted, was insufficient to support defendant's cross motion to dismiss complaint pursuant to CPLR 1021 where it could not demonstrate prejudice]; *Tokar v Weissberg*, 163 AD3d 1031, 1032-1033 [2d Dept 2018] [lapse of 2½ years between decedent's death and defendant's submission of motion to dismiss under CPLR 1021 is insufficient to support defendant's contention that substitution had not been made within a

reasonable time, particularly where, as here, the case revolved around medical records already in defendant’s possession]; *see also Lee v Leeds, Morelli & Brown, P.C.*, 233 AD3d at 1076-1077 [despite the fact that the record did not establish diligence in seeking substitution, “there has been no prejudice to the defendants”] *cf. Kelly v St. Francis Hosp.*, 100 AD3d 707, 708 [2d Dept 2012] [affirming dismissal of complaint where no attempt at substitution was made during the three years following the plaintiff’s death]; *Palmer v Selpan Elec. Co.*, 5 AD3d 248, 248 [1st Dept 2004] [dismissing complaint where no substitution had been effectuated for more than four years after the decedent’s death]).

Accordingly, it is

ORDERED that the motion is denied.

This constitutes the Decision and Order of the court.

5/29/2025
DATE


JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: